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No. 92-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELON D. CRAWFORD, *et al.*,
Petitioners,

V.

WILLIAM LEAHY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Subsequent to a medical negligence claim arbitrated pursuant to Maryland's Health Care Malpractice Claims Act, resulting in Mrs. Crawford's rejection of the damages determination only, did the Maryland Courts violate Mrs. Crawford's rights guaranteed to her by the United States Constitution, Fourteenth Amendment, Section 1 and/or adversely impact the goal of the Federal Government to solve the national health care crisis; by causing Mrs. Crawford to also seek judicial review of the unrejected determination of liabilty, even though there was no action in court to nullify the award as to liability, by any party?

LIST OF PARTIES TO THE PROCEEDING

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FEDERAL STATUTES:

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MARYLAND STATE STATUTES:

Maryland Code (1989, 1991 cum. supp.) 3-2A-01 through 3-2A-09 (the Act) . . . . . iii, 3, 4, 5, 7, 18

OTHER FEDERAL AUTHORITIES:

United States Department of Health, Education and Welfare, Report of the Secretary's Commission on Medical Malpractice 4 (1973) [the HEW Report] 2, 3

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THE QUESTION PRESENTED IS RIPE AND DOES MERIT REVIEW

Dr. Leahy and Neurological Medicine, P.A., (collectively Dr. Leahy), the Respondents, attempt through their "Brief In Opposition To Petition For Writ Of Certiorari", to diminish the authority of this Court and it's jurisdiction in matters that may threaten the goals of United States. See *Hanna v. Plumer*, Mass. 1965, 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed. 2d 8.

The Respondents suggest that while Federal policy is evolving, matters are best left in the hands of the States, while disregarding the Federal crisis at hand. In fact, it was the State of Marylands response to the medical malpractice crisis that evolved subsequent to and with the benefit of Federal initiatives.

The Respondents unfairly characterize the policy of the United States toward health care, as "far from decided, as seen in the debate of the current presidential campaign." (Page 23 of Respondents Brief).

Clearly, President Bush is not the first President to recognize the impact of medical malpractice upon the future of health care in this country and the profound consequences. See *U.S. Dep't of Health, Education and Welfare, Report of the Secretary's Commission on Medical Malpractice 4* (1973) [hereinafter cited as the HEW Report]. The creation of the Federal Commission by Presidential Order to study the problems of medical malpractice is ample evidence of a national concern that vitally affects the ways in which health care is rendered in this country.

The *HEW Report* of 1973 does indeed demonstrate that a Federal interest in Medical Malpractice preceded both the current political arena as well as the enactment of the *Maryland Health Care Malpractice Claims Act* (the *Act*).

Subsequent to the Federal initiative, the Maryland legislature attempted to reform tort laws in order to reduce the expense and time required to litigate medical malpractice claims, by enacting the *Act* but the decision of the Court of Appeals of Maryland in this case, prevents the *Act* from achieving its purpose by reforming tort laws. Citing *B.N. v. K.K.*, 312 Md. 135, 141, 538 A.2d 1175, 1178 (1988) "One of the fundamental principles of tort law is that damages are an integral part of liability" (See decision at page A.36 of the Appendix provided in Petition), the Court of

Appeals of Maryland effectively denied the Maryland legislature the ability to reform tort laws in the public interest as the *Act* provided. Yet the Court of Appeals had previously agreed with other State and Federal Courts that "there is no vested interest in any rule of the common law, *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 134, 24 L.Ed. 77 (1987), so that the common law 'may be abbrogated or changed as the General Assembly may think most conducive to the general welfare'", see *Attorney General v. Johnson*, 282 Md. 168, 385 A.2d 57, 71. The *Act* however, does not divest liability from damages, but merely provides an alternative mechanism to resolve issues in dispute under which the Petitioners met their burden of proving liabilty against Dr. Leahy and Neurological Medicine, P.A.

Absolutely nowhere in the *Act*, is there any mention of de novo review by the courts or any language that mandates that the Courts must review all the determinations of an arbitration panel or none at all. Clearly, the Maryland legislature recognizes the ability of a Court of law to fairly itemize damages or reach a conclusion for any rejected arbitration determination, without compelling the Courts to also decide unrejected arbitration determinations resolved by the *Act*. It is unreasonable to assume that a Court of law would necessarily increase an arbitration determination of damages only because the determination of liabilty was already resolved through the alternative mechanism of arbitration. To the contrary, the Courts could very well reduce the amount of damages.

Increased litigation costs and the time required of the Courts however, are a certainty if judicial review is also required for determinations that have been resolved through arbitration and can only serve to compound the Federal health care crisis.

Notwithstanding, the discretion of this Court to grant the petition for writ of certiorari based on the special and important reasons presented by the Petitioners, the Respondents ignore that Mrs. Crawford also relied on and filed with the trial court, a summary of case laws, in support of her position (See pages 51-52 of petition). Even though Mrs. Crawford did not succeed in convincing the trial court, the trial court clearly departed from the decision of the United States Court of Appeals in *Lipscomb v. Memorial Hospital, et al*, 733

F. Supp. 2nd 332 (4th Cir. 1984), by improperly shifting the burden of proof requirements, thus preventing Mrs. Crawford from having a fair trial. Mrs. Crawford also provided the Court of Appeals of Maryland with a copy of the case law summary which had been filed with the trial court.

Additionally, 10 days before trial in the instant case, the Court of Appeals of Maryland issued a decision in the "*Gettes*" case (See *Central Collection v. Gettes*, 321 Md. 671, 584 A.2d 689) in which the Court of Appeals of Maryland reserved unto itself, until another day, resolution of the question as to whether an award on the merits could be subdivided into awards of liabilty and damages under the Act. This left Mrs. Crawford standing before the trial court, facing the prospect that the Court of

Appeals of Maryland had effectively become both the State court of first resort and last resort for Mrs. Crawford, while having to first defend the liability determination in trial court. Additionally, the procedural error of the burden of proof requirements, virtually assured a reversal of the liability determination against Dr. Leahy.

Ultimately, when Mrs. Crawford was afforded the opportunity to present her question to the Court of Appeals of Maryland, that Court denied Mrs. Crawford equal protection under the laws and rendered a decision that threatens the ability of the Federal Government to assure that affordable, quality health care remains available to the population of this country. The Fourteenth Amendment to the United States Constitution, Section 1,

was violated when the Court of Appeals of Maryland failed to provide Mrs. Crawford equal protection under the law and as further explained in the Petition for Writ of Certiorari before this Court.

The Respondents also attempt to dismiss the *Health Care Quality Improvement Act of 1986* [42 U.S.C. 11101, et seq.], as only pertaining to professional peer review (hereinafter the *Federal Act*). While the *Federal Act* does address professional peer review under Part "A", the Respondents ignore the other significant provisions contained in Part "B" of the *Federal Act*.

Significantly, the *Federal Act* establishes a National Practitioner Data Bank for Adverse information on Physicians and Other Health Care Practitioners, for which the final

regulations were published in the *Federal Register* on October 17, 1989; Vol. 54, No. 199 as administered through the Department of Health and Human Services. The Federal Data Bank is required because "There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure of the physician's previous damaging or incompetent performance." (Sec. 402(2) of the *Federal Act*) and because "The occurence of medical malpractice and the need to improve the quality of care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State." (Sec. 402(1) of the *Federal Act*).

The Maryland Courts however, circumvent the reporting requirements of the *Federal Act* by causing judicial review of an unrejected liability finding not before

the Courts that would otherwise be reported in compliance with the *Federal Act*. Thus, even though Dr. Leahy did not reject the liability finding against him, the Maryland Courts deprived the Federal Government and each State, knowledge of Dr. Leahy's negligence as was determined by the Arbitration Panel.

It is ironic and unfair that the respondents contend that the Petitioners never raised the Federal Question in the Courts below, where Dr. Leahy successfully concealed from Mrs. Crawford and the Courts, information pertaining to any past medical negligence claims. Dr. Leahy's denial that he or Neurological Medicine, P.A., had ever been named in a medical negligence case, clearly demonstrates why the *Federal Act* was necessary. Furthermore, by granting the Petition For Writ Of Certiorari To The

Court of Appeals of Maryland, this Court may determine whether or not the Maryland Courts improperly reviewed the liabilty finding against Dr. Leahy, and if so, Dr. Leahy's liabilty would consequently be reported to the National Practitioner Data Bank, preventing Dr. Leahy from failing to disclose the information relevant to the liability finding against him in the future.

Mrs. Crawford is only able to provide this Court with the information of which she has discovered through her own efforts and those of her husband, regarding evidence that Dr. Leahy provided her with false answers to interrogatories and she does not know if there is more evidence or not. But Mrs. Crawford has found that Dr. Leahy's attorney, Mr. Mark D. Gately (Counsel of Record), who provided service of Dr.

Leahy's answers to interrogatories to Mrs. Crawford, also had previously represented another physician, Dr. Cantor, who is also a member of Neurological Medicine, P.A., practicing with Dr. Leahy. More specifically, Mrs. Crawford has discovered a letter by Mr. Mark D. Gately addressed to the Health Claims Arbitration Office on December 9, 1985 accompanied by a Miles & Stockbridge check for payment of costs attributed to Dr. Cantor, one of the defendants in HCA Case No. 83-150. In that letter, Mr. Gately expresses thanks for the customary cooperation. Although HCA Case No. 83-150 did not name the professional association of Neurological Medicine, P.A. as a defendant, concurrently HCA Case No. 84-265 was before the Health Claims Arbitration Office also and did name both

Neurological Medicine, P.A. and William R. Leahy, M.D. as defendants in that case. Although Mrs. Crawford has found other medical negligence claims that were filed against other physicians who belong to the small practice of Neurological Medicine, P.A., it is inexcusable that Dr. Leahy denied to Mrs. Crawford that neither he or Neurological Medicine, P.A. had ever been named in a medical negligence suit when in fact both had. Additionally, as explained in the Petition before this Court, it is equally inexcusable and an obstruction of the justice system, that during the trial in this instant case, Dr. Leahy's other attorney, Mr. Neal Brown, also of the law firm of Miles and Stockbridge, informed the jury that this was the first time Dr. Leahy had to go through something like this, while Dr. Leahy

continued to conceal from Mrs. Crawford and the Courts, information relevant to past medical negligent claims.

Having successfully witheld this information from Mrs. Crawford during the Arbitration proceedings and the subsequent judicial review in the Maryland Courts, the Respondents now argue before the Supreme Court Of The United States, that Mrs. Crawford failed to raise a Federal question in the State Courts. Clearly however, this case presents squarely, issues that should be reviewed by this Court and demonstrates the applicability of the Federal Act, which should prevent Dr. Leahy from concealing the Arbitration determination of liabilty against him.

At page 14, footnote 2, of the Respondents Brief, issue was taken with alleged misstatements of fact contained

in the Petition for Writ of Certiorari. The referenced report authored by Dr. Fisher, was a letter to Mrs. Crawford, dated September 18, 1986 and made no mention of a case against Dr. Leahy as the Respondents describe. This Court should notice how the Respondents, by slight of hand, carefully refrained from including Dr. Leahy's name within their quotation. Infact, it was not until December of 1986 that Dr. Fisher of Johns Hopkins hospital completed the duplication of testing on Mrs. Crawford, that had been performed previously by Dr. Leahy. Thus any speculation as to whether a case against Dr. Leahy was strong or not, would have been premature and furthermore as explained in the petition, Dr. Fisher had previously expressed concern to Mrs. Crawford about a potential case against the drug

manufacturer. It is therefore unfair for the Respondents to interject Dr. Leahy's name into a report by assumption.

Only in December of 1986 was Dr. Fisher able to provide Mrs. Crawford with the results of her testing which determined that Mrs. Crawford did not have a seizure disorder, results which were confirmed independently by two other physicians at Johns Hopkins Hospital, at Dr. Fishers request.

Dr. Leahy however, prevented Mrs. Crawford from introducing her health care records from Dr. Fisher and Johns Hopkins Hospital as evidence during the trial in the Circuit Court for Prince Georges County, Maryland, by convincing Associate Judge James P. Salmon that Mrs. Crawfords health care records from Dr. Fisher were not admissible. This tactic was an attempt by Dr. Leahy to drive up the

the litigation costs and discourage Mrs. Crawford from pursuing her claim.

Clearly the Maryland legislature recognizes the harm of this often used tactic and provided a solution in the *ACT* under 3-2A-05(a)(3) which provides:

> "Properly authenticated hospital records and the records of treating health care providers are admissable without the necessity of calling the physician, subject to reasonable notice and the right of the opposing party to depose."

Additionally, the Respondents contend that there is no evidence whatsoever that Mrs. Crawford had "burns over her entire body or suffered from internal injuries". The evidence is crystal clear however, that Mrs. Crawford suffered a toxic reaction to the drug tegretol which was

prescribed by Dr. Leahy for a seizure disorder, that Mrs. Crawford subsequently learned was wrong.

There are three medical terms that describe the toxic reaction Mrs. Crawford suffered: 1) Stevens-Johnson syndrome

2) Toxic Epidermal Necrolysis

3) Erythema Multiforme

Among the evidence admitted to the Arbitration Panel, The Circuit Court for Prince George's County, Maryland and the Court of Appeals of Maryland are extensive photo exhibits of Mrs. Crawford which vividly show the damages to her body during her hospitalization and subsequent recovery. The credibility of the Respondents assertions could well be dispelled by this Court, upon an examination of the evidence and exhibits in this case.

CONCLUSION

The decision by the Court of Appeals of Maryland not only deprived Mrs. Crawford of her rights under the United States Constitution as provided in the Fourteenth Amendment, Section 1, but the State decision also conflicts with Federal case law, a Federal Act, and the goals of the Federal Government as well.

Petitioners respectfully ask this Court to grant the Petition for Writ of Certiorari to the Court of Appeals of Maryland for the special and important reasons presented therein.

Respectfully submitted,

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